UNITED STATES DISTRICT COURT
For the Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DANIEL J. BERNSTEIN,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Defendants,

and

McGLASHAN & SARRAIL, THE FIRST AMENDMENT PROJECT, LEE TIEN, CINDY A. COHN, ROBERT CORN-REVERE,

Applicants for Intervention.
_____/

No. C 95-0582 MHP

MEMORANDUM AND ORDER
Re: Motion to Intervene

In 1995, plaintiff Daniel Bernstein filed an action against the United States Department of State seeking declaratory and injunctive relief from enforcement of the Arms Export Control Act and the International Traffic in Arms Regulations. After several years of litigation and a trip to the Ninth Circuit, the case was resolved on summary judgment when on July 28, 2003, this court granted defendants' summary judgment motion on plaintiff's second amended complaint, concluding that plaintiff lacked standing. Now before the court is a motion to intervene by plaintiff's former attorneys, McGlashan & Sarrail, the First Amendment Project, Lee Tien, Cindy A. Cohn, and Robert Corn-Revere ("applicants"). Applicants seek to recover attorneys' fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412. After having considered the parties' arguments, and for the reasons stated herein, the court rules as follows.

BACKGROUND[1]

I. Facts

Bernstein is an associate professor in the Department of Mathematics, Statistics, and Computer Science at the University of Illinois at Chicago. His research interests include cryptography, a field of applied mathematics that uses computer programs to encrypt electronic communications. Encryption converts a set of data into code, and a strong encryption system can ensure data integrity, authenticate users, link messages to their senders, and maintain confidentiality. In June 1992, Bernstein submitted source code for an encryption algorithm he called "Snuffle," together with papers explaining the program, to the Department of State. Under the then-current Arms Export Control Act ("AECA"), 22 U.S.C. § 2278, and the International Traffic in Arms Regulations ("ITAR"), 22 C.F.R. §§ 120-30, the Department of State determined that "Snuffle" was a "defense article" subject to limited export of encryption items and that it required a license for export under the United States Munitions List ("USML"). Bernstein v. Dep't of Commerce, No. 95-0582 (N.D. Cal. July 28, 2003) (order granting defendant's motion for summary judgment).

In 1994, plaintiff entered into a Pro Bono Representation Agreement ("Agreement") with applicant McGlashan & Sarrail for the purposes of seeking declaratory and injunctive relief against the United States. The Agreement includes three clauses concerning the disposition of attorneys' fees in the plaintiff's case. Section 2 of the Agreement provides:

> 2. Attorney's Fees. Our office will not bill you for the legal services which we perform on your behalf. We have decided to take this case on a pro bono basis. We will, however, pursue the recovery of attorneys fees, and costs and other expenses under applicable law.

Section 7 further specifies:

> 7. Withdrawal or Termination. We and any other attorney we have associated on this matter may withdraw from your representation at any time after giving you reasonable notice. You may also terminate our services at any time. If we withdraw from representing you or are terminated by you, we shall be entitled, upon successful conclusion of the case, to pursue the recovery of attorneys fees, under any applicable law equal to the reasonable value of the services we have performed up to the date of our withdrawal.

Agmt § 7 (emphasis in original). The Agreement also provides that other associated attorneys have the right to seek recovery of attorneys' fees:

> 5. Association of Other Attorneys. We may, at our sole discretion and expense, associate any other attorneys in the representation of your claim. The terms of such association, if

> any, will be disclosed to you. Such associated attorneys may also pursue recovery of attorneys fees. At this time, it appears that Lee Tien and also Shari Steele of the EFF will act as either associated counsel or legal consultants.

The First Amendment Project and Robert Corn-Revere subsequently became associated attorneys on plaintiff's case.

II. Procedural History

Plaintiff originally brought this action against the Department of State seeking declaratory and injunctive relief from defendants' enforcement of the AECA and the ITAR, contending that the export controls were unconstitutional both on their face and as applied. After transfer of enforcement responsibility to the DOC, several revisions to the contested export regulations, years of litigation, and an appeal to the Ninth Circuit,[2] the court held in July 2003 that plaintiff no longer had standing in light of particular revisions to the export regulations and several DOC advisory opinions; these advisory opinions informed plaintiff that, because of the regulation revisions, he was no longer subject to prosecution based on the export restrictions at issue. Accordingly, the court entered summary judgment for the defendants on July 28, 2003. Bernstein v. Dep't of Commerce, No. 95-0582 (N.D. Cal. July 28, 2003) (Patel, C.J.).

Plaintiff filed a motion for reconsideration on August 6, 2003, which this court denied on August 18, 2003. The period during which plaintiff could have appealed the denial expired on October 17, 2003. See Fed. R. App. P. 4(a)(1)(B) & 4(a)(4)(A)(iv). Thirty-one days later, on November 17, 2003,[3] applicants filed an ex parte Miscellaneous Administrative Request to Extend Time seeking to extend the deadline for filing motions for attorneys' fees to December 15, 2003. The court granted the request on November 21, 2003. On December 15, 2003, the applicants 1) entered a stipulation with the parties extending the time to file motions regarding applicants' eligibility for attorneys' fees,[4] and 2) moved to intervene under Federal Rule of Civil Procedure 24(a)(2) as plaintiffs in the present action for the purposes of collecting attorneys' fees under the EAJA, 28 U.S.C. § 2412.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 24, a non-party may move to intervene in a federal action either as a matter of right or with the court's permission. Fed. R. Civ. P. 24(a) & (b). To intervene as a matter of right, a non-party must show: 1) that it has a significant protectable interest relating to the property or transaction that is the subject of the action; 2) that the disposition of the action may, as a practical matter, impair or impede the applicants' ability to protect their interest; 3) that the application is timely; and 4) that the existing parties may not adequately represent the applicants' interest. S. Cal. Edison Co. v. Lynch, 307 F.3d 794, 802 (9th Cir. 2002) (citing United States v. City of Los Angeles, 288 F.3d 391, 397 (9th Cir. 2002)); see also League of United Latin Am. Citizens v. Wilson, 131 F.3d 1297, 1302 (9th Cir. 1997) (holding that all four requirements must be satisfied). Applicants have a "significant protectable interest" in an action if 1) they assert an interest that is protected under some law, and 2) there is a "relationship" between their legally protected interest and the plaintiff's claims. S. Cal. Edison, 307 F.3d at 803 (citing Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998)). The interest at stake need not be a specific legal or equitable interest, but the would-be intervenor must be able to show "a protectable interest of sufficient magnitude to warrant inclusion in the action." Smith v. Pangilinan, 651 F.2d 1320, 1324 (9th Cir. 1981).

DISCUSSION

Under the EAJA, a prevailing party has thirty days from the date of final judgment in an action to file an application for attorneys' fees. Section 2412(d)(1)(B) of the EAJA provides, in relevant part:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection . . . .

A "final judgment" includes any "judgment that is final and not appealable." 28 U.S.C. § 2412(d)(2)(G). The parties do not contest that the judgment in this action became final on October 17, 2003. Rather, the parties dispute whether the court may extend the EAJA thirty-day filing deadline past November 17, 2003.

The court starts with the principle that the EAJA is a statute that waives sovereign immunity. Auke Bay Concerned Citizen's Advisory Council v. Marsh, 779 F.2d 1391, 1392-93 (9th Cir. 1986). Such waivers are bounded by the explicit terms of the statute. See, e.g., Ardestani v. INS, 502 U.S. 129, 137

(1991) (strictly construing the EAJA partial waiver of sovereign immunity in favor of the United States according to the terms of the statute). In this case, the EAJA's thirty-day limitation period for submitting fee applications is jurisdictional. Yang v. Shalala, 22 F.3d 213, 216 n.4 (9th Cir. 1994) (stating that EAJA thirty-day limitation is jurisdictional for purposes of filing for attorneys' fees against an agency under 5 U.S.C. § 504); Auke Bay, 779 F.2d at 1393 (9th Cir. 1986) (holding that the thirty-day limitation period under EAJA is jurisdictional). "[A] litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court." Torres v. Oakland Scavenger Company, 487 U.S. 312, 317 n.3 (1988). Thus, a failure to file an application for fees under the EAJA within thirty days of a final judgment deprives the court of jurisdiction to consider an application for attorneys' fees. See, e.g., Columbia Mfg. Corp. v. Nat'l Labor Relations Bd., 715 F.2d 1409 (9th Cir. 1983) (holding that, because the EAJA filing deadline was jurisdictional, the NLRB was compelled to apply the thirty-day limit strictly to fee applications under 5 U.S.C. § 504). Neither the court nor the parties may create subject matter jurisdiction where none exists.

In this case, the applicants did not comply with the EAJA's jurisdictional time limit. The last day for the applicants to file an application for fees under the EAJA was November 17, 2003. On that date, the applicants filed a Miscellaneous Administrative Request to Extend Time for the purpose of allowing the applicants and the existing parties to complete the meet and confer process required by Civil Local Rule 54-5.[5] While the court granted this request, it had no authority to do so because the EAJA time limit is jurisdictional. For the same reason, moreover, the parties could not stipulate to extend the deadline. See id. at 1409. Thus, the applicants did not then and cannot now file their application for fees within the jurisdictional time limit.

The applicants argue that the court should equitably toll the EAJA filing deadline. This court need not decide whether equitable tolling would be available to extend the EAJA's jurisdictional time limit because the applicants have not put forth a sufficient equitable basis for invoking the doctrine. Equitable tolling generally applies when "extraordinary circumstances beyond [applicants'] control made it impossible to file the claims on time." Seattle Audubon Soc'y v. Robertson, 931 F.2d 590, 595 (9th Cir. 1991), rev'd on other grounds, 503 U.S. 429 (1991). Courts apply the doctrine of equitable tolling "sparingly." Scholar v. Pacific Bell, 963 F.2d 264, 268 (9th Cir. 1992). Equitable tolling may apply "in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period,

or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Irwin v. Dep't of Vets. Affairs, 498 U.S. 89, 96 (1990). Equitable tolling is inappropriate, however, "where the claimant failed to exercise due diligence in preserving his legal rights." Id. (citing Baldwin County Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984)).

The applicants have demonstrated no extraordinary circumstances beyond their control that would have caused them to miss the filing deadline. They had been in contact with the defendants and plaintiff since at least October 7, 2003, regarding attorneys' fees. Coppolino Dec., Exh. 1. Defendants asked the applicants to provide a basis for their view that they were entitled to fees under the EAJA on October 21, 2003, see Coppolino Dec., Exh. 2, to which the applicants responded on October 22, 2003, that they would draft memo on the issue. Id. at Exh. 3. The applicants also exchanged email with plaintiff on the subject beginning on October 1, 2003. Bernstein Dec., Exh. H. While defendants did not inform applicants that they would not stipulate to an extension until November 17, 2003, they did not induce or trick applicants into missing the deadline. Applicants have known since August 18, 2003 (and certainly since October 1, 2003 when they raised the issue with plaintiff) that the EAJA deadline was approaching.

Applicants cannot argue that they failed to meet the EAJA deadline because they relied upon this court's order granting the applicants' request to extend time by thirty days. The court granted the request on November 21, 2003, three days after the EAJA filing deadline. An extension granted by the court after a filing deadline has passed cannot be a reasonable basis for applicants to believe that a deadline can be extended. Nor does their administrative request constitute "actively pursu[ing . . .] judicial remedies by filing a defective pleading during the statutory period." Irwin, 498 U.S. at 96. In this case, equitable tolling, even were it available to extend a jurisdictional time limit, is inappropriate because the applicants "failed to exercise due diligence in preserving [their] legal rights." Id. The applicants' request for additional time was also not a deficient pleading of the type contemplated in Irwin;[6] it was a request for an extension of time the court could not grant. This is a classic example of a failure to exercise reasonable diligence in preserving legal rights—a failure that equitable tolling is not designed to remedy. Therefore, applicants are not entitled to intervene pursuant to Federal Rule of Civil Procedure 24(a)(2).[7]

CONCLUSION

For the reasons stated above, the court DENIES the Motion to Intervene by applicants McGlashan & Sarrail, the First Amendment Project, Lee Tien, Cindy A. Cohn, and Robert Corn-Revere.

IT IS SO ORDERED.

Date: April 19, 2004

/s/
MARILYN HALL PATEL

Chief Judge
United States District Court
Northern District of California

ENDNOTES

1. Except as otherwise noted, the facts have been culled from the moving papers.

2. This case has an extensive procedural history. In December 1996, this court held that the export controls as applied to plaintiff's program were an unconstitutional prior restraint in violation of the First Amendment. Bernstein v. United States Dep't of State, 945 F. Supp. 1279, 1296 (N.D. Cal. 1996) (Patel, C.J.). Jurisdiction over the export of nonmilitary encryption products was transferred to the DOC and the affected encryption items were thereafter subject to the Export Administration Regulations ("EAR"), 15 C.F.R. §§ 730 et seq. The DOC then issued an interim rule regulating the export of certain encryption products. 61 Fed. Reg. 68572 (Dec. 30, 1996). In response to these changes, plaintiff amended his complaint to add new defendants and address the new regulations. In August 1997, the court held that the interim rule was an unconstitutional prior restraint in violation of the First Amendment and granted plaintiff's motion for a preliminary injunction against the defendants, enjoining them from enforcing the new regulations against the plaintiff or those seeking to use, discuss, or publish the plaintiff's encryption program. Bernstein v. United States Dep't of State, 974 F. Supp. 1288, 1310-11 (N.D. Cal. 1997) (Patel, C.J.).

Defendants appealed, and the Ninth Circuit affirmed the district court's decision. Bernstein v. United States Dep't of Justice, 176 F.3d 1132 (9th Cir. 1999). The Ninth Circuit withdrew its panel decision and ordered the case heard *en banc*, Bernstein v. United States Dep't of Justice, 192 F.3d 1308 (9th Cir. 1999), but before the rehearing could take place, defendants announced plans to make additional changes to the EAR. In January 2000, defendants added 14 C.F.R. section 740.13(e) to the Federal Register, which allows the DOC to exempt "publicly available" encryption source code from license requirements. Plaintiff amended his complaint in January 2002, alleging that the changed regulations still amounted to a prior restraint under the First Amendment. The defendants brought a motion for summary judgment on the amended complaint on the grounds that he lacked the requisite standing, which this court granted on July 28, 2003.

The preceding procedural background, however, does not guide the court's decision because the disposition of the applicants' motion to intervene rests solely upon jurisdictional grounds.

3. November 17, 2003 was a Monday. Time periods of greater than eleven days are measured by calendar day, including weekends and legal holidays. Where a deadline falls on a court holiday or a weekend, the deadline is extended to the next business day. Fed. R. Civ. P. 6(a). Because the thirty-day filing deadline for EAJA fell on Sunday, November 16, 2003, the Federal Rules permit filing an application on Monday, November 17, 2003.

4. The defendants expressly did not stipulate that the court had jurisdiction to extend the EAJA filing deadline. See Stipulation and Proposed Order ¶ 7.

5. In any event, the meet and confer requirement set forth in Civil Local Rule 54-5 is a precursor to a motion for attorneys' fees that must be filed within fourteen days of entry of judgment by the district court, not final judgment. Since the entry of judgment was made on July 28, 2003 by this court, the appropriate motion or stipulation to enlarge time should have been filed by August 11, 2003. Local Rule 54-5, Motion for Attorney's Fees, provides:

> (a) Time for Filing Motion. Unless otherwise ordered by the Court after a stipulation to enlarge time under Civil L.R. 6-2 or a motion under Civil L.R. 6-3, motions for awards of attorney's fees by the Court must be served and filed within 14 days of entry of judgment by the District Court. Filing an appeal from the judgment does not extend the time for filing a motion. Counsel for the respective parties must meet and confer for the purpose of resolving all disputed issues relating to attorney's fees before making a motion for award of attorney's fees.

6. Applicants filed only a Miscellaneous Administrative Request to Extend Time on the November 17, 2003, EAJA filing deadline. Even assuming it were possible to extend or equitably toll the EAJA jurisdictional deadline, the applicants' filing was not merely a deficient pleading; it was fatally defective because it did not state their eligibility (or even plaintiff's eligibility) for recovery of fees under the EAJA. Indeed, applicants' filing made no reference the EAJA at all.

7. Because applicants do not have a protectable interest sufficient to satisfy the first prong of the test for intervention, it is unnecessary to reach the merits of the other intervention factors. Failure on any of the four prongs defeats the applicants' motion to intervene as of right. League of United Latin Am. Citizens, 131 F.3d at 1302.